

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

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Complainant,

v.

CELLCO PARTNERSHIP &
AFFILIATED ENTITIES d/b/a
VERIZON WIRELESS

Defendant.

Proceeding No. 16-242
File No. EB-16-MD-003

APPLICATION FOR REVIEW

September 5, 2019

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APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's rules, I respectfully request that the Commission review the August 6, 2019 Order from the Enforcement Bureau in this proceeding ("August 6, 2019 Order" or "Order"). The Order intentionally or unintentionally overlooks material evidence and believes false claims over verifiable facts.¹

I. SUMMARY

On July 26, 2016, I filed a formal complaint against Cellco Partnership & Affiliated Entities d/b/a Verizon Wireless ("Verizon") asserting Verizon violated the Communications Act, the "C Block Rules,"² and the Open Internet Rules, including the Transparency Rule (47 CFR § 8.1, as of June 11, 2018) by:

- Interfering with and disadvantaging customers'/edge providers' ability to use/make available the devices and applications of their choice,
- Disabling FM chips included by device manufacturers,
- Disabling Apple SIMs, and
- Disclosing misleading, deceptive, and inaccurate information.

On August 6, 2019, the Enforcement Bureau denied my complaint in whole.

II. QUESTIONS PRESENTED AND STANDARD OF REVIEW

I submit the following questions for review:

1. Whether the Order erred in claiming that I offered no "first-hand" or "reliable" evidence about Verizon's pricing and accounting, in spite of the fact that I offered

1 Per 47 CFR § 1.115(k), the filing of an application for review is a condition precedent to judicial review of any action taken pursuant to delegated authority.

2 See 47 CFR 27.16 and *Service Rules for the 698–746, 747–762 and 777–792 MHz Bands et al.*; WT Docket No. 06-150 *et al.*; Second Report and Order; 22 FCC Rcd. 15289 (2007) ("700 MHz Second Report and Order").

my bills from Verizon, Verizon's pricing disclosures on its own Web site, FCC documents, SEC filings from Verizon, and statements to investors from Verizon that confirm my assertions.

2. Whether the Order erred in claiming I didn't set forth a *prima facie* case that Verizon was not transparent about its "certification" process and exploited this lack of transparency.
3. Whether the Order erred in believing Verizon's claim that it offers a proprietary "tethering service" over the primary and authoritative source of information about the Android operating system (its source code), which proves tethering is a device feature offered by edge providers.
4. Whether the Order erred in believing Verizon's claim that devices that include FM chips don't include FM chips.
5. Whether the Order erred in I claiming I didn't cite device suppliers.
6. Whether the Order erred in dismissing the misleading, deceptive, and inaccurate information Verizon admitted it disclosed.

Section 1.115(b)(2) of the Commission's rules enumerate factors which warrant Commission consideration, including, "(iv) An erroneous finding as to an important or material question of fact" and "(v) Prejudicial procedural error."

III. ARGUMENT

The Order intentionally or unintentionally overlooks material evidence and believes false claims over verifiable facts.

- A. **The Order falsely claims that I offered no “first-hand” or “reliable” evidence about Verizon’s pricing and accounting, even though I offered my bills from Verizon, Verizon’s pricing disclosures on its own Web site, FCC documents, SEC filings from Verizon, and statements to investors from Verizon that confirm my assertions.**

In my July 26, 2016 Complaint, I asserted that:

- Verizon violated the C Block Rules³ by imposing activation fees and effective monthly access charges that discriminated against me and other customers who sought to use devices outside of those provided by Verizon.
- Verizon violated its transparency obligations under the Communications Act, C Block Rules, and Open Internet Transparency Rule by denying month-to-month line access discounts to month-to-month customers but publishing disclosures stating that Verizon would apply the discounts. (Customers who bring their own devices don’t enter service contracts or equipment financing contracts with Verizon and are thus “month-to-month” customers.)

The Bureau did waive 47 CFR § 1.721(a)(5), “to the extent it requires complainant to provide an affidavit explaining the basis for any allegation made on information and belief,”⁴ and I did support my assertions with secondary sources.⁵ However, I didn’t exclusively rely on

3 See 47 CFR § 27.16(b) (“Licensees offering service on spectrum subject to this section shall not deny, limit, or restrict the ability of their customers to use the devices and applications of their choice on the licensee’s C Block network”) and 700 MHz Second Report and Order, 22 FCC Rcd. 15371 ¶ 222 [“In that regard, we emphasize that C Block licensees may not impose any additional discriminatory charges (one-time or recurring) or conditions on customers who seek to use devices or applications outside of those provided by the licensee.”]

4 February 2, 2016 Letter from Rosemary H. McEnery (Deputy Chief, Market Disputes Resolution Division) to Alex Nguyen (Complainant) and David Haga (Counsel for Defendant)

5 *E.g.*, see Shawn De Cesari, <https://www.androidpolice.com/2015/03/28/shocker-even-after-launching-the-nexus-6-verizon-still-wont-officially-activate-one-that-wasnt-purchased-from-the-carrier/> (“So, if you want the privilege of using a non-Verizon device on its

secondary sources, as the Order falsely claims.

First, contrary to the Order's claims,⁶ evidence (first-hand or otherwise) of direct damage to the complainant is not a condition precedent to finding that Verizon violated the Communications Act or the Commission's rules.⁷ (For example, I needn't show that misleading, deceptive, or incorrect disclosures by Verizon caused me or anyone else \$X of damages for the Commission to find that Verizon violated the Commission's transparency rules.)

Second, the Order's claim that I offered "no first-hand, reliable evidence about the pricing plans Verizon offered to customers"⁸ is absurd and patently false. Whether or not I needed to, I offered:

- *My bills from Verizon.*⁹ They offer first-hand evidence that Verizon applied month-to-month line access discounts for month-to-month customers using devices originally provided by Verizon¹⁰ but denied month-to-month line access discounts to month-to-month customers using devices outside of those provided by

Verizon.¹¹ My bill dated May 20, 2015 offers first-hand evidence for my assertion

network, you could be stuck paying a full \$40 monthly access fee on top of your data plan, rather than \$15 or \$25 as you would with a recognized device.")

6 Order at 8 ¶ 17 ("In any event, Nguyen failed to provide reliable evidence showing that this incorrect information on Verizon's FAQ page caused him to suffer damages.")

7 See Section 208 of the Communications Act: "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

8 Order at 6 ¶ 13

9 July 26, 2016 Exhibits at 348–373, <https://ecfsapi.fcc.gov/file/10726214500114/2016-07-26-exhibits-merged-standard.pdf#page=348>

10 See "Beginning on 05/20/15: \$15 Off Month to Month Line Access Discount" on page 3 of the bills dated May 20, 2015–July 20, 2015. I was using an Apple iPhone originally provided by Verizon.

11 See the bills dated August 20, 2015 and later. I bought an unlocked Apple iPhone (Model A1549, FCC ID: BCG-E2816A) instead of financing the same model (Model A1549, FCC ID: BCG-E2816A) through Verizon. See, e.g., Reply to Defendant's First Set of Interrogatories at 2–3 (March 10, 2017) ["Verizon increased the effective "line access charge" on my line by 60% (from \$25.00 to \$40.00/month).']

that Verizon imposed an activation fee that discriminated against customers who sought to use devices outside of those provided by Verizon instead of financing them through Verizon.¹²

- *Verizon's pricing disclosures on its own Web site.* Verizon disclosed that customers would receive line access discounts if they met two requirements: an equipment financing or month-to-month requirement (not entering a service contract that bundles in the cost of a device subsidy) and a data allowance requirement.¹³ Verizon's main Web page for its "MORE Everything" plan explicitly stated (without even mentioning discounts/offsetting credits) that for customers who bring their own smartphones, the line access charge is \$25/month for data allowances up to 4 GB and \$15/month for data allowances of 6 GB or higher.¹⁴ These disclosures were misleading, deceptive, and inaccurate, because as the evidence above shows, Verizon denied line access discounts to customers who met the month-to-month and data allowance requirements. If Verizon had requirements beyond the month-to-month and data allowance requirements (*e.g.*, whether or not customers use devices outside of those provided by Verizon) for its

12 See "Cellular Service – Activation" (\$40.00) on page 4 of the bill dated May 20, 2015.

13 July 26, 2016 Exhibits at 342–344, <https://ecfsapi.fcc.gov/file/10726214500114/2016-07-26-exhibits-merged-standard.pdf#page=342> ("The monthly line access charge if you have a smartphone with Verizon Edge or are on a month-to-month agreement: • \$25 if you have a MORE Everything Plan with a data allowance up to 4 GB. However, it will show up on your bill as a \$40 charge with an offsetting \$15 credit. • \$15 if you have a MORE Everything Plan with a data allowance of 6 GB or higher. However, it will show up on your bill as a \$40 charge with an offsetting \$25 credit.")

14 *Id.* at 345–347, <https://ecfsapi.fcc.gov/file/10726214500114/2016-07-26-exhibits-merged-standard.pdf#page=345> ("FULL PRICE OR BRING YOUR OWN ... Shared Data 6 GB & Up \$15/mo. line access per smartphone. Shared Data 4 GB & Under \$25/mo. line access per smartphone.")

pricing, Verizon's disclosures should have informed customers of these requirements, but clearly, they neglected to do so.

Obviously, my bills from Verizon are first-hand evidence, and Verizon's pricing disclosures on its own Web site are not assertions based on belief: Verizon's Web site is a primary source for Verizon's pricing disclosures, and per the Communications Act and FCC rules, including the Open Internet Transparency Rule, these disclosures must be truthful and accurate.

Similarly, to rebut Verizon's false claims that its base \$40/month service charge per smartphone on its "Nationwide" plans¹⁵ and \$40/month line access charge per smartphone on its "MORE Everything" plans 'did not "bundle in" or reflect the cost of any device subsidy,'¹⁶ I did support my assertions with secondary sources:

- *The Wall Street Journal* confirmed my assertions: "Users of the new plan, then, are effectively paying twice for their devices: the existing bundled charge for the subsidy, plus the new device financing charge."¹⁷
- *Reuters* confirmed my assertions: "Verizon pays an upfront subsidy to phone makers and recoups the cost gradually through the monthly service fees it charges

15 Verizon's "Nationwide" plans price "line access charges" and "data allowance charges" per line, while its "MORE Everything" plans price "line access charges" per line but share "data allowance charges" between one or more lines. For a smartphone line on a "Nationwide" plan, the base "service charge" was \$40/month, because the "line access charge" was \$10/month, and the base data package (2 GB/month) was \$30/month. Smartphone lines with data allowances higher than 2 GB/month have higher service charges.

16 Ambio Declaration at 2 ¶¶ 4 and 6 (September 22, 2016), [https://ecfsapi.fcc.gov/file/10922869908255/Answer%20\(with%20exhibits%2C%20including%20Information%20Designation\).pdf#page=103](https://ecfsapi.fcc.gov/file/10922869908255/Answer%20(with%20exhibits%2C%20including%20Information%20Designation).pdf#page=103)

17 Thomas Gryta, <https://www.wsj.com/articles/SB10001424127887324448104578613612706427942> (July 18, 2013)

customers.”¹⁸

- *The Verge* confirmed my assertions: “But scratch past that surface layer and the Edge plan is just the same shell game as AT&T Next, designed to sucker customers into paying both the device subsidy built into Verizon’s already high monthly fees and the full retail price of their phones. (Like AT&T, Verizon discloses that the subsidy exists in its SEC filings, but declined to divulge the exact amount when I asked.)”¹⁹

However, again, I didn’t exclusively rely on secondary sources:

- FCC documents like the Wireless Telecommunications Bureau’s competition reports confirmed my assertions: “However, when customers bring an unlocked device to a postpaid plan, they generally do not receive a device subsidy from the provider nor do they typically receive a lower-priced service plan that would reflect the fact that the provider does not have to recoup the cost of the subsidy.”²⁰
- SEC filings (like the ones mentioned by the reports above) from Verizon confirmed my assertions: “Wireless providers recovered those subsidies through higher service fees.”²¹
- Statements to investors from Verizon confirmed my assertions: “What we have

18 Sinead Carew, <https://www.reuters.com/article/us-verizon-edge-idUSBRE96H10S20130718> (July 18, 2013)

19 Nilay Patel, <https://www.theverge.com/2013/7/18/4535068/verizons-edge-phone-upgrade-plan-same-bad-ripoff-as-att-next>

20 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*; Fourteenth Report; 25 FCC Rcd. 11593–11594 ¶ 312–314

21 Verizon Communications Inc., SEC Form 10-K for the fiscal year ended December 31, 2015 at 7

said going forward is, look, the better measurement here is not service margin EBITDA but regular EBITDA percent on total revenue because that kind of normalizes out the fact that we are now recording 100% of the revenue upfront for the sale of the equipment rather than a subsidy and then recouping that through service pricing over a period of time.”²²

Obviously, Verizon’s SEC filings and statements to investors are primary sources for Verizon’s accounting, and just as the Communications Act and FCC rules, including the Open Internet Transparency Rule, require that relevant disclosures be truthful and accurate, the Securities Act and SEC rules require that Verizon’s SEC filings and statements to investors be truthful and accurate.

Again, the Order’s claim that Verizon’s false claims aren’t rebutted by first-hand or reliable evidence is absurd and patently false.

B. The Order erroneously claims I didn’t set forth a *prima facie* case that Verizon was not transparent about its “certification” process and exploited this lack of transparency.

Verizon’s transparency obligations include providing accurate responses specifying the basis for denying access to devices or applications.²³ Moreover, “Once a complainant sets forth a *prima facie* case that the C Block licensee has refused to attach a device or application in violation of the requirements adopted in this section, the licensee shall have the burden of proof to demonstrate that it has adopted reasonable network standards and reasonably applied those

22 Fran Shammo, Verizon Communications Inc Earnings Call, Q3 2015, <https://www.verizon.com/about/system/files/quarterly-report-transcripts/3Q%2015%20VZ%20Transcript.pdf>

23 47 CFR § 27.16(d)(2) (“If a licensee determines that a request for access would violate its technical standards or regulatory requirements, the licensee shall expeditiously provide a written response to the requester specifying the basis for denying access and providing an opportunity for the requester to modify its request to satisfy the licensee’s concerns.”)

standards in the complainant's case.”²⁴

The Order erroneously claims I didn't set forth a *prima facie* case that Verizon was not transparent about its “certification” process and exploited this lack of transparency.²⁵ As this application for review and my earlier filings make clear, I set forth a *prima facie* case that Verizon violated the Communications Act and the Commission's rules, but the Order intentionally or unintentionally overlooked first-hand and reliable evidence and believed false claims over verifiable facts. The other sections of this application for review repeat other examples from my earlier filings, so below, I repeat just one example for this section.

In response to denying attachment of my Google Nexus 6 in 2015,²⁶ Verizon claimed Google had the means to deliver software to Google Nexus devices sold through Verizon but didn't have the means to deliver software to the same models sold by Motorola or Google (until Verizon claims Verizon and Google “worked together to develop a solution”).²⁷ However, Google develops the Android operating system included in many devices, including Google's own Nexus brand of devices, and obviously had a solution (the Internet) already to deliver software to devices running software primarily developed by Google. In fact, Google had already delivered software updates directly from Google to devices like the Nexus 4 (released in 2012) and Nexus 7 (released in 2013). Google confirmed this fact:

Nexus 4, Nexus 5, Nexus 6, Nexus 7, Nexus 9, and Nexus 10 devices receive the

24 47 CFR § 27.16(f)

25 Order at 5 ¶ 12, 6 ¶ 14

26 The Nexus 6 hardware was primarily developed by Motorola; most of the included software (notably, the Android operating system) was developed by Google.

27 Verizon, Legal Analysis at 28 (September 22, 2016) (“Google initially was unable to provide a means for delivering the necessary software that met Verizon's technical standards to versions of the Nexus 6 purchased from other sources. After the initial launch of the device, however, Verizon and Google worked together to develop a solution to deliver the necessary software to those devices.”)

latest version of Android directly from Google.²⁸

Confronted with facts contradicting its initial response, Verizon admitted Google was able to deliver software to devices that allowed them to work on the Verizon network in the past,²⁹ but upon *ipse dixit*, claimed Google’s ability to deliver software in the past is “irrelevant” to Google’s ability to deliver software in the future.

Additionally, Verizon provided a new alibi: the carrier claimed it needed to ensure Voice over LTE (VoLTE) worked.³⁰ If you assume Verizon’s false claim that Google couldn’t use the Internet to deliver software to Google Nexus devices sold by Google isn’t false, Verizon’s new alibi *could* sound plausible. However, VoLTE didn’t work on Verizon’s Droid Turbo and remained buggy for months into 2015,³¹ yet Verizon apparently “certified” it before the 2014 holiday season anyway. See Complaint §§ III.C and IX.A, Reply §§ III.C and IX.A, and the C Block Rules:

We expect that ... the standards applied to third parties will be no more restrictive than those applied to the provider’s preferred vendors. We believe that standards transparency should greatly reduce the potential for manipulative “white-listing,” i.e., providers creating complex and vague qualification and approval processes for third parties before approval to attach devices or run applications on the

28 Google, *Android updates: Nexus & Google Play edition devices*, <https://web.archive.org/web/20141227095521/https://support.google.com/nexus/answer/4457705>

29 Verizon, Answer at 53–54 ¶ 131 (“The fact that Google was able to deliver software to the Asus Nexus 7 tablets that allowed them to work on the Verizon network is irrelevant to its ability to deliver software necessary to allow the Nexus 7 [sic?] to work on Verizon’s network.”)

30 Verizon, Answer at 30 ¶ 52

31 Kellen Barranger, <https://www.droid-life.com/2014/10/30/fyi-droid-turbo-cant-currently-do-simultaneous-voice-and-data/>; Kellen Barranger, <https://www.droid-life.com/2015/02/23/minor-droid-turbo-21-44-12-update-fixes-a-couple-of-bugs-here-is-the-changelog/> (“The update is indeed software version 21.44.12 and it fixes three bugs. Those three bugs involve call volumes, the email application, and the DROID Command Center Widget. Verizon’s list of changes doesn’t even mention VoLTE or Advanced Calling 1.0.”)

network.³²

Clearly, Verizon was not transparent about its “certification” process (claiming Google couldn’t use the Internet to deliver software to Google Nexus devices sold by Google) and exploited this lack of transparency to apply “standards” regarding VoLTE that were more restrictive than those applied to Verizon’s Droid Turbo.

C. The source code of the Android operating system is not information based on belief; it’s the primary and authoritative source of information about the Android operating system.

In its September 22, 2016 Answer, Verizon denied it was ultimately responsible for disabling tethering features built into devices and claimed charging \$20/month to re-enable the features doesn’t violate its C Block obligations,³³ because Verizon claims tethering is not a device feature developed by edge providers but a proprietary “service” offered by Verizon.³⁴ Verizon’s claims are based on belief, and they’re false.

The Bureau did waive 47 CFR § 1.721(a)(5), “to the extent it requires complainant to provide an affidavit explaining the basis for any allegation made on information and belief,” and I did support with secondary sources my assertions that Verizon didn’t create a “tethering service,” that tethering is a device feature, and that Verizon is ultimately responsible for disabling

32 700 MHz Second Report and Order, 22 FCC Rcd. 15372 ¶ 224

33 See 47 CFR §§ 27.16 (b) (“Licensees offering service on spectrum subject to this section shall not deny, limit, or restrict the ability of their customers to use the devices and applications of their choice on the licensee’s C Block network”) and (e) (“No licensee may disable features on handsets it provides to customers”).

34 Vaidya Declaration at 2 ¶ 4 (September 22, 2016) (“I am aware that the Complaint also makes allegations regarding the availability of tethering on devices Verizon sells to its customers. Verizon does not disable any tethering feature or functionality, nor does it block customers from using any third-party tethering applications that are available and work on their particular devices. Verizon does offer its own tethering service (Mobile Hotspot/Mobile Broadband Connect) in connection with certain data plans, for which Verizon has charged a \$20 per month fee.”)

tethering features:

In addition to a SIM lock, branding galore, and the company's suite of ringtones, AT&T (and Verizon apparently) also managed to talk Google and/or Motorola into baking a subscription check into the ROM³⁵ at AOSP [Android Open Source Project]-level as a prerequisite for enabling tethering. Because it's built into the firmware, the hotspot check happens on any Nexus 6 that has an AT&T SIM card in it, regardless of where it was purchased.³⁶

However, I didn't exclusively rely on secondary sources, as the Order falsely claims.

I cited not only a sworn declaration ("They built into the framework of all the Nexus 7 devices a hidden disabling function for the Nexus 7 Hotspot function"³⁷) but also the primary and authoritative source of information about the Android operating system: Google's source code repository for the Android operating system (also cited by the secondary source above).

The file `/src/com/android/settings/TetherSettings.java` in the repository available via <https://android.googlesource.com/platform/packages/apps/Settings> and the file `packages/SettingsLib/src/com/android/settingslib/TetherUtil.java` in the repository available via <https://android.googlesource.com/platform/frameworks/base> correspond to the programming code behind the user interface of Android's embedded tethering feature. At the time of writing, the relevant source code allowing carriers to disable tethering was:

```
public static boolean isProvisioningNeeded(Context context) {  
    // Keep in sync with other usage of config_mobile_hotspot_provision_app.  
    // ConnectivityManager#enforceTetherChangePermission  
    String[] provisionApp = context.getResources().getStringArray(  
        com.android.internal.R.array.config_mobile_hotspot_provision_app);
```

35 https://android.googlesource.com/device/moto/shamu/+/_c1109e92e2765111e4e17c5766fde42a6bd19784 ("Shamu" is the code name of the Nexus 6. The MCC/MNC combinations in the commit associated with Verizon are 204/04, 310/004, and 311/480.)

36 Shawn De Cesari, *[The Stark Contrast] Nexus 6 On Sprint And T-Mobile Vs. AT&T*, <https://www.androidpolice.com/2014/11/24/the-stark-contrast-nexus-6-on-sprint-and-t-mobile-vs-att/> (Internal link converted to footnote.)

37 *Worldcall Interconnect, Inc. v. AT&T Mobility LLC.*, Proceeding No. 14-221, File No. EB-14-MD-011, Reply Declaration of Lowell Feldman at 84

```

        if (SystemProperties.getBoolean("net.tethering.noprovisioning", false)
            || provisionApp == null) {
            return false;
        }
        // Check carrier config for entitlement checks
        if (isEntitlementCheckRequired(context) == false) {
            return false;
        }
        return (provisionApp.length == 2);
    }
}

```

Whether one or more provisioning applications (`provisionApp`) can or cannot allow a carrier to disable or otherwise control the tethering features built into a device is determined by the `config_mobile_hotspot_provision_app` array defined in device-specific “overlay files” corresponding to a carrier’s mobile country codes and mobile network codes (MCC/MNC). For example, commit messages in Google’s source code repository confirm the sworn declaration above that tethering features built into the Nexus 7 were disabled “per AT&T requirements”³⁸ and the secondary source above that AT&T and Verizon did the same for the Nexus 6.³⁹ See my October 31, 2016 Reply at 7–9 for more citations to Google’s source code repository.

Moreover, the commit logs for these tethering-related files show contributions from Google and edge providers like Motorola but no contributions from Verizon.

The source code of the Android operating system is not information based on belief; it’s the primary and authoritative source of information about the Android operating system, and it proves tethering is a feature developed by edge providers like Apple and Google—not a “service” offered by wireless service providers like Verizon—that one can use to share a mobile Internet connection on one device (via Wi-Fi, Bluetooth, or USB) with multiple devices, just as

38 <https://android.googlesource.com/device/asus/deb/+/f0130356a775005cca71008b26a5ad4a0ca50bdb> (“Per AT&T requirements, disable tethering and MHS [mobile hotspot] for all AT&T MCC/MNC combinations.”) (“Deb” is the code name of the Nexus 7.)

39 *Supra* notes 34–35

Wi-Fi is a feature on routers developed by edge providers like Netgear and Arris—not a “service” offered by fixed service providers like Comcast—that one can use to share a fixed Internet connection with multiple devices.

D. That a software update pushed by Verizon can disable previously-working features enabled by an included FM chip but can’t erase an included FM chip from existence isn’t an assertion based on belief; it’s just a fact.

Again, the Order’s claim that I didn’t rebut Verizon’s false claims with first-hand evidence or reliable evidence is false. For example, I cited research papers from the National Association of Broadcasters (NAB) that show devices Verizon claims don’t include FM chips⁴⁰ do include FM chips,⁴¹ cited disclosures from NextRadio (an FM radio application provider that directly worked with device makers that sell devices through Verizon), and averred FM radio features worked on my HTC One M8 smartphone until Verizon pushed a software update that made the features stop working.⁴² (Upon *ipse dixit*, the Order determines a device supplier can be a reliable source⁴³ but doesn’t make the same determination for an application provider like NextRadio that directly worked with device suppliers.)

40 Verizon, Re: Notification of Intent to File Formal Complaint at 1–2, <https://ecfsapi.fcc.gov/file/10726214500114/2016-07-26-correspondence-merged.pdf#page=17> (May 11, 2016) (“The HTC One M9 that Verizon sells does not have an FM tuner.”)

41 NAB, <https://www.nab.org/xert/sciTech/2015/RD05182015.pdf> [The HTC One M9 is a Class 1 smartphone: ‘FM receiver hardware (“FM Chip”) is onboard but not wired to function, and/or required software is not installed.’]; Skip Pizzi and Stephanie Christel, *FM Radio in Smartphones: A Look Under the Hood*, <https://nabpilot.org/wp-content/uploads/2016/06/2015-BEC-Paper-FM-Radio-in-Smartphones-FINALr4.pdf> [“All other required software for FM reception is included in the phone, however (as it is on all versions of this phone worldwide, including as delivered by other U.S. wireless carriers), so if the consumer downloads the NextRadio app (see below) from an Android store and installs it on the phone, the FM receiver on the phone will be fully enabled.”]

42 See, e.g., Reply to Defendant’s First Set of Interrogatories at 3 (March 10, 2017)

43 Order at 7 ¶ 15

FM radio worked with Android 5 (“Lollipop”) on my HTC One M8 smartphone, and NextRadio directly worked with device suppliers like HTC and made the NextRadio application work on Android 6 (“Marshmallow”). However, Verizon removed the FM hardware application programming interface (API) when Verizon pushed the Android 6 update and made the NextRadio application stop working on Android 6:

Typically, device manufacturers do not include FM support unless the wireless carrier requests it. Sprint and AT&T have done this.

HTC is an exception. HTC includes FM support in several of their devices regardless of wireless carrier. That’s why the NextRadio app works on these devices even when purchased from carriers that have not yet partnered with NextRadio.

The HTC One M8 shipped from HTC with Android 5 Lollipop installed. Recently, HTC and wireless carriers updated the M8 to Android 6 Marshmallow.

NextRadio works on Marshmallow. We adhered to Google’s Marshmallow compatibility guidelines, and worked with device manufacturers to ensure the app performs well.

Unfortunately, when Verizon pushed the Marshmallow update to their M8 phones, they appear to have removed the FM hardware API, so NextRadio is no longer able to control the FM receiver chip. Several other carriers also sell the M8, and have also updated them to Android Marshmallow. NextRadio still works on the M8 sold through all carriers except Verizon.

The FM API can't be included in the NextRadio app, and it can't be added back once it has been removed. So there is no way to restore NextRadio support to Verizon’s M8s.⁴⁴

In addition to falsely claiming that devices that include FM chips don’t, Verizon shifted blame from itself to device manufacturers Verizon falsely claims didn’t “choose to include” FM radio chips⁴⁵ and falsely claimed that Verizon didn’t block FM radio capabilities or applications

44 NextRadio, *I have an HTC One M8 on Verizon. Why did NextRadio stop working?* <https://helpcenter.nextradioapp.com/hc/en-us/articles/210009633-I-have-an-HTC-One-M8-on-Verizon-Why-did-NextRadio-stop-working-> (emphasis mine)

45 Verizon, Company Policies,

after purchase.⁴⁶ (Device manufacturers included FM chips but Verizon chose to disable them.)

That a software update pushed by Verizon can disable previously-working features enabled by an included FM chip but can't erase an included FM chip from existence isn't an assertion based on belief; it's just a fact. (Regardless, the Order chose to believe Verizon's false claims.)

E. The Order erroneously claims I didn't cite device suppliers.

To set forth a *prima facie* case that Samsung intended to preload Samsung Pay on Samsung devices but that Verizon interfered with Samsung's intentions, I cited not only reliable sources reporting that Verizon interfered with Samsung's intentions over "economics"⁴⁷ but also Samsung's own Web site, which stated that Samsung intended to preload Samsung Pay on Samsung devices.⁴⁸

The Order's claim dismissing my assertions about the network compatibility of iPhone 5c

<https://web.archive.org/web/20160907012045/https://www.verizon.com/about/responsibility/policies> ("There are no requirements that prevent Verizon's handset suppliers from providing an FM radio chip in their devices.... Verizon will continue to support the sale of devices from manufacturers that choose to include an FM radio chip. If this is a feature that receives greater consumer demand, more manufacturers will likely choose to include it.")

46 Verizon, Answer at 39 ¶ 72 (September 22, 2016) ("Verizon denies that it blocked HTC from providing FM tuner capability on devices sold by Verizon.... Verizon may sell devices that include an FM radio chip but do not include preloaded FM radio applications. However, Verizon does not block such applications after purchase.")

47 Jason Del Rey, <https://www.recode.net/2015/10/21/11619830/samsung-pay-eliminates-big-hurdle-by-snagging-verizon-as-partner> ('A Samsung Pay executive said this summer at a press briefing that the holdup with Verizon was over "economics," but declined to comment further.')

48 Samsung, <https://web.archive.org/web/20150929060500/http://www.samsung.com/us/support/answer/ANS00043831/997409700/> ("Samsung Pay will be preloaded on future compatible Samsung devices and will not be available for download in Google Play store or Galaxy Apps. Samsung Galaxy S6 and Samsung Galaxy S6 edge users will receive a software update with Samsung Pay when the service is made available later this year in the U.S.")

and iPhone 5s devices is similarly erroneous.⁴⁹ See Apple’s own Web site: “The unlocked iPhone 5c and unlocked iPhone 5s will also work on the CDMA networks of Sprint and Verizon Wireless. The unlocked iPhone 4s will work only on GSM wireless networks and will not work with CDMA-based carriers, including Sprint and Verizon Wireless.”⁵⁰ Verizon compatibility on Model A1532 iPhone 5c (FCC ID: BCG-E2644A) and Model A1533 iPhone 5s (FCC ID: BCG-E2642A) sold “unlocked” by Apple directly was disabled per Verizon requirements shortly after September 21, 2013; however, “carrier-unlocked” Model A1456 iPhone 5c (FCC ID: BCG-E2642A) and Model A1453 iPhone 5s (FCC ID: BCG-E2642A) are still compatible with the Upper 700 MHz Band C Block spectrum Verizon licenses and deploys for LTE Band 13. (These averments in my earlier filings were based on first-hand experience. See the sections regarding Samsung and Apple in my earlier filings for more details.)

F. The Order erroneously dismissed the misleading, deceptive, and inaccurate information Verizon admitted it disclosed.

First, contrary to the Order’s claims,⁵¹ evidence of direct damage to the complainant is not a condition precedent to finding that Verizon violated the Communications Act or the Commission’s rules.⁵² (For example, I needn’t show that misleading, deceptive, or incorrect disclosures by Verizon caused me or anyone else \$X of damages for the Commission to find that Verizon violated the Commission’s transparency rules.)

Second, the Order’s dismissal is based on the erroneous premise that Verizon rectified its

49 Order at 8 ¶ 18

50 Apple, *About the Unlocked iPhone*, <https://web.archive.org/web/20130921183217/http://store.apple.com/us/iphone/family/iphone4/about-unlocked> (September 21, 2013)

51 Order at 8 ¶ 17 (“In any event, Nguyen failed to provide reliable evidence showing that this incorrect information on Verizon’s FAQ page caused him to suffer damages.”)

52 See Section 208 of the Communications Act: “No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.”

disclosures after a not “unreasonable period of time.” The Order assumes this should be the period between my December 28, 2015 letter and Verizon’s January 18, 2016 notification (21 days).⁵³ However, as I averred, Verizon “certified” Apple iPhone 6 and 6 Plus devices sold by competing sources on August 13, 2015,⁵⁴ and Verizon confirmed this averment,⁵⁵ so Verizon disclosed misleading, deceptive, and inaccurate information that was inconsistent with its own policies for at least 158 days.

IV. CONCLUSION

The August 6, 2019 Order intentionally or unintentionally overlooks material evidence and believes false claims over verifiable facts. For the foregoing reasons, the Commission should reverse the August 6, 2019 Order in whole.

Respectfully submitted,



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September 5, 2019

⁵³ Order at 7-8 ¶ 17

⁵⁴ July 26, 2016 Complaint at 21 ¶ 51 [‘On August 13, 2015 (almost 47 weeks after release), Verizon finally “certified” iPhone 6 and iPhone 6 Plus devices sold by competing sources.’] (Internal citations omitted.)

⁵⁵ Verizon, Responses to Complainant’s First Set of Interrogatories at 2–4 (April 21, 2017)